

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF OKLAHOMA**

**IN RE BROILER CHICKEN  
GROWER LITIGATION (NO. II)**

Case No. 6:20-md-2977-RJS-CMR

Chief Judge Robert J. Shelby

Magistrate Judge Cecilia M. Romero

This Document Relates To All Actions

**DECLARATION OF MICHAEL F. TUBACH IN SUPPORT OF  
NON-PARTY JAYSON PENN'S MOTION FOR LEAVE TO INTERVENE  
AND FOR ENTRY OF A PROTECTIVE ORDER**

I, Michael F. Tubach, declare under penalty of perjury and 28 U.S.C. § 1746 that the following is true and correct:

1. I am a partner of O'Melveny & Myers LLP with an office located at Two Embarcadero Center, 28th Floor, San Francisco, California 94111-3823. I am a member of the bars of the State of California (active) and the District of Columbia (inactive), and I have been admitted *pro hac vice* to the bar of this Court. I have personal knowledge of the facts stated herein and, if called to testify, could and would testify competently hereto.

2. I serve as counsel to Jayson Penn. Mr. Penn is the former chief executive officer of Pilgrim's Pride Corporation ("Pilgrim's") and a defendant in *United States v. Penn et al.*, Case No. 1:20-cr-00152-PAB (D. Colo.), a criminal antitrust action pending in the District of Colorado. The first indictment in the criminal action was returned on June 2, 2020, and named Mr. Penn and three other individuals as defendants. *United States v. Penn et al.*, Case No. 1:20-cr-00152-PAB (D. Colo.), ECF No. 1.

3. A superseding indictment was returned on October 6, 2020. It named an additional six defendants. Attached hereto as Exhibit 1 is a true and correct copy of the superseding indictment. *United States v. Penn et al.*, Case No. 1:20-cr-00152-PAB (D. Colo.), ECF No. 101.

4. Attached hereto as Exhibit 2 is a true and correct copy of a press release that the U.S. Department of Justice issued on February 23, 2021, entitled "One of the Nation's Largest Chicken Producers Pleads Guilty to Price Fixing and Is Sentenced to a \$107 Million Criminal Fine." I retrieved the press release from the U.S. Department of Justice's website at <https://www.justice.gov/opa/pr/one-nation-s-largest-chicken-producers-pleads-guilty-price-fixing-and-sentenced-107-million>.

5. Attached hereto as Exhibit 3 is a true and correct copy of a press release that the U.S. Department of Justice issued on October 7, 2020, entitled "Six Additional Individuals Indicted On Antitrust Charges In Ongoing Broiler Chicken Investigation." I retrieved the press release from the U.S. Department of Justice's website at <https://www.justice.gov/opa/pr/six-additional-individuals-indicted-antitrust-charges-ongoing-broiler-chicken-investigation>.

6. Attached hereto as Exhibit 4 is a true and correct copy of a press release that the U.S. Department of Justice issued on June 3, 2020, entitled “Senior Executives at Major Chicken Producers Indicted on Antitrust Charges.” I retrieved the press release from the U.S. Department of Justice’s website at <https://www.justice.gov/opa/pr/senior-executives-major-chicken-producers-indicted-antitrust-charges>.

7. Attached hereto as Exhibit 5 is a true and correct copy of the Class Action Complaint that civil plaintiffs filed in *U.F.C.W Int’l Union Local 464A et al. v. Pilgrim’s Pride Corporation et al.*, Case No. 1:20-cv-01966 (D. Colo. July 6, 2020). This complaint names Mr. Penn as a defendant and was filed approximately one month after the original indictment was returned on June 2, 2020. *Id.* ¶¶ 14, 17-18.

8. Attached hereto as Exhibit 6 is a true and correct copy of the Verified Shareholder Derivative Consolidated Complaint and Jury Demand that civil plaintiffs filed in *In re Pilgrim’s Pride Corporation Derivative Litigation*, Case No. 2017CV30207 (Weld Cty. Colo. Dist. Ct. Oct. 14, 2020). The complaint names Mr. Penn as a defendant and was filed approximately one week after the superseding indictment was returned on October 6, 2020. *Id.* ¶¶ 42-45.

9. Attached hereto as Exhibit 7 is email correspondence that counsel for all plaintiffs in *In re Broiler Chicken Grower Litigation (No. II)*, Case No. 6:20-md-2977-RJS-CMR (E.D. Okla.), sent to me on July 23, 2021. Plaintiffs noted that Mr. Penn's pending criminal antitrust trial is scheduled to "conclude on or about December 22, 2021, which is approximately one month before the close of our fact discovery deadline and our deadline for expert reports (both of which are February 1, 2022)." Plaintiffs stated that they understand "that Mr. Penn would assert his fifth amendment rights in any deposition scheduled before his criminal trial," while for "any deposition scheduled after his criminal trial, Mr. Penn might provide substantive testimony, but may well still assert his fifth amendment rights." Plaintiffs argued that "[g]iven these circumstances, there is no justification for waiting to depose Mr. Penn until the eleventh hour of our discovery period." I responded on August 2, 2021, informing plaintiffs I would accept service on behalf of Mr. Penn and that Mr. Penn intended to seek a protective order to stay his deposition pending the resolution of the criminal proceedings. I also asked for plaintiffs' position on a briefing schedule before this Court. Plaintiffs' counsel replied on August 2, 2021, with a proposed briefing schedule calling for Mr. Penn's opening brief on August 30, 2021, plaintiffs' response on September 27, 2021, and Mr. Penn's reply on October 11.

10. Attached hereto as Exhibit 8 is the deposition subpoena plaintiffs served on Mr. Penn. I accepted service on behalf of Mr. Penn.

11. Since receiving plaintiffs' email regarding their intentions to subpoena Mr. Penn on July 23, 2021, I have worked diligently to identify local counsel, be admitted to this Court *pro hac vice*, and prepare the accompanying motion seeking leave to intervene and for a protective order.

Berkeley, California

/s/ *Michael F. Tubach*

Dated: August 30, 2021

Michael F. Tubach

### **CERTIFICATE OF SERVICE**

I hereby certify that I have caused the foregoing to be filed on the Court's CM/ECF system, which automatically provides notice to counsel for all parties to the above-captioned action.

Dated: August 30, 2021

Respectfully submitted,

By: /s/ Michael F. Tubach

Michael F. Tubach (*pro hac vice*)  
O'MELVENY & MYERS LLP  
Two Embarcadero Center  
28th Floor  
San Francisco, CA 94111-3823  
Tel.: (415) 984-8700  
Fax: (415) 984-8701  
mtubach@omm.com